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Traditional Military Operations: A Legitimate Policy Alternative to Covert Action

by

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TRADITIONAL MILITARY OPERATIONS: A LEGITIMATE POLICY ALTERNATIVE TO
COVERT ACTION

by

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TRADITIONAL MILITARY OPERATIONS: A LEGITIMATE POLICY ALTERNATIVE TO COVERT ACTION

Introduction

Covert action and traditional military activities are two policy options for the legitimate use of force by the United States. For the President to employ the full span of capabilities available to him there must be a clear understanding of the unique nature of each option. The CIA has, for decades, employed covert activities internationally to further U.S. interests, with the goal of avoiding the stigma of U.S. sponsorship. Likewise, the DOD has been employed to further U.S. interests abroad, having refined its precision targeting capability to a level never before available to an American President, both inside and outside of the designated areas of armed conflict. It is, therefore, critical that national-security decision-makers properly employ these tools under the appropriate conditions to align with national policy in the defense of the nation. Misapplication of these tools, however, carries with it consequences that may equally degrade U.S. standing in the international domain.¹ This paper will argue that the legitimate use of military force should be conducted as a clandestine military operation, and not a covert action. No change or addition to domestic or international law is necessary or recommended: this is a policy issue. To refine the law would be to further constrain national-security decision making in the face of future, and unforeseen threats.

Al Qaeda attacked the homeland of United States of America on September 11, 2001 (9/11) and altered the national security consciousness of the United States forever.² September 11th will forever be the day that our nation was first confronted with, and failed, in the challenge of defending itself against foreign terrorist attacks within the

continental United States that achieved their intended effects. As a result of these attacks, the nation demanded to know how the national security system of the United States could be taken by surprise and challenged by non-state actors armed only with a meticulous plan, box-cutters, commercial airline pilot training, and hostile intent. Despite the gaps and fissures in the national security system of the United States-- explicitly identified by the 9/11 Commission--that enabled al Qaeda to execute their plan, the President of the United States continues to possess the necessary tools to combat type of this. There is, however, still room for improvement to reduce the remaining seams in our system.³ The focus of this paper is not upon what remains to be done to shore up our national security system, but to sharpen the policy decision between the use covert action and traditional military activity, capabilities that are already at the disposal of the President of the United States.

Background

On 18 September 2001, the President of the United States was given the authorization by a joint resolution of the 107th Congress to use all military force necessary to pursue those persons, organizations, or nations that planned, authorized, committed, aided, or harbored those that conducted the 9/11 attacks to prevent and deter future international terrorist attacks posing a threat against the United States.⁴ The Authorization for Use of Military Force (AUMF) is important to note in this discussion because Congress gave the President the statutory authority to use the military toward the ends specified in the joint resolution without a formal declaration of war, as provided by the War Powers Act of 1973. The War Powers Act, more importantly, is a Legislative Branch check, upon the President's ability as Commander-

in-Chief to employ the armed forces where hostilities are ongoing or imminent beyond sixty days, unless the Congress has specifically authorized it by a joint resolution.⁵ To date, the Congress has not revoked the AUMF despite the ongoing debate regarding whether or not the scope of the military's recent activities exceed the original intent of 2001 authorization.⁶ Yet the military forces of the United States remain the Nation's primary foreign policy tool for the application of legitimate force when it is directed by the President, authorized by Congress, and is in compliance with international law. Yet, the United States military is not the only tool that the President may use to influence the political, military, or economic domains of foreign nations, organizations, or persons abroad as legitimized by U.S. domestic law.

The Central Intelligence Agency is another tool available to the President that was designed to influence the interests of the United States abroad. The Congress established the Central Intelligence Agency (CIA) in the National Security Act of 1947. Although the Act has been amended since the original version, Congress assigned the CIA the responsibility for the collection of human intelligence (HUMINT), the analysis and dissemination of this intelligence, the direction and coordination of national HUMINT outside of the United States, and the performance other functions relating to the national security as deemed necessary by the President or the Director of National Intelligence.⁷ It is the 'performance of other functions relating to national security' that is interpreted by the branches of the United States government to authorize covert action: influencing foreign events without the role of the government being apparent or acknowledged.⁸ Thus, CIA covert action, as directed by the President, is a viable tool in accordance with domestic law for the Chief Executive to utilize to counter terrorist

operations aimed at the US. Yet, it is precisely the decision to use of covert action that employs the use of force to achieve a foreign policy goal that is at the heart of this discussion.

Particularly since 9/11, the convergence, or merging, of the Department of Defense (DOD) and CIA operations has been noted by some members of Congress, with some concern, as to the legal implications of blending the separate authorities of these organizations: the Title 10/Title 50 debate. Title 10 and Title 50 are United States Code (U.S.C.), or laws, that define the roles and responsibilities of the DOD and the intelligence community, respectively.⁹ The CIA is but one part of the intelligence community, as is the DOD, but Title 50 and Title 10, U.S.C. are widely used lexicon describing the authorities of the CIA and DOD, respectively. The topic of this paper, however, concentrates only upon the element of Title 50 U.S.C., relating to covert action, and that some activities labeled as such should instead be considered traditional military activities. This argument requires an examination of covert action and its exemptions according to the domestic legal architecture of the United States, as well as the relevant international humanitarian law (IHL) regarding the use of legitimate force. Furthermore, a treatment of pertinent counter-arguments to this proposal adds support to the position that our laws are sufficient to provide for our national security: this contentious debate can be remedied through more effective policy. The President has been given the tools necessary to carry out his policy objectives and those reflected in the AUMF with respect to al Qaeda. This paper seeks to help refine the use of those tools, under the proper conditions, to enhance the legitimacy of the United States of

America. This is not a critique of covert action as a tool, only its misapplication when the use of force is employed.

Covert action in domestic law

Covert action was defined by statute for the first time in 1991 as “... an activity or activities of the United States Government to influence the political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly...”¹⁰ Additionally, there exist three general categories of covert activities: political, propaganda, and paramilitary.¹¹ The definition served to identify the intelligence activities that required the President’s approval. The legislation went on to identify the process by which covert action would be authorized to ensure these activities received the appropriate oversight, despite being directed by the President:¹²

- A finding must be in writing.
- A finding may not retroactively authorize covert activities which have already occurred.
- The President must determine that the covert action is necessary to support identifiable foreign policy objectives of the United States.
- A finding must specify all government agencies involved and whether any third party will be involved.
- A finding may not authorize any action intended to influence United States political processes, public opinion, policies, or media.
- A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.

- Notification to the congressional leaders specified in the bill must be followed by submission of the written finding to the chairmen of the intelligence committees.
- The intelligence committees must be informed of significant changes in covert actions.
- No funds may be spent by any department, agency or entity of the executive branch on a covert action until there has been a signed, written finding.

The procedures for notifying specified members of Congress with a written finding were established into law to concentrate the executive branch's reporting toward the two intelligence committees: the House Permanent Select Committee for Intelligence and the Senate Select Committee for Intelligence. Furthermore, the President is allowed, in extreme circumstances, the flexibility to limit the reporting of any covert action to the chairmen and ranking minority members of these committees, the speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate: the "Gang of Eight."¹³ The President is mandated by statute to keep both of the intelligence committees "fully and currently informed" including any significant anticipated intelligence activities, in a timely manner. If notification is not given after a finding has been signed, but prior to the execution of the covert action in order "to meet extraordinary circumstances affecting the vital interests of the United States," then the President must inform the specified congressional leaders within 48 hours and provide a written explanation for not providing advanced notice.¹⁴ These detailed oversight and reporting requirements for covert action

represent the legislative limitations placed on the power of the executive branch as a result of perceptions of past abuse, but they do not provide insight or clarity as to which governmental agencies, organizations, or entities are envisaged to participate.¹⁵

Traditionally, covert action has been associated with, and conducted by, the CIA.¹⁶ Yet, during the Reagan Administration, the President issued Executive Order 12333 (EO 12333) that opened up the potential for any agency of the United States government to conduct covert action as long as it abided by the finding procedures set forth by the law, though the law only specified the CIA.¹⁷ The most current version of EO 12333 stipulates the following: “No agency except the Central Intelligence Agency (or the Armed Forces of the United States in time of war declared by Congress or during any period covered by a report from the President to Congress consistent with the War Powers Resolution, Public Law 93-148) may conduct any covert action activity unless the President determines that another agency is more likely to achieve a particular objective...”¹⁸ Additionally, whichever agency or organization is selected to participate in a covert action is subject to the same procedures as the CIA, or the procedures already established by that agency, organization, or entity.¹⁹ Therefore, EO 12333 codifies in policy, rather than legislation, that the CIA is the default executive agency envisaged for the conduct of covert operations, except in times of conflict, and it establishes the statutory process as the definitive standard recognized by Congress. The executive order is a policy that provides the President with the flexibility to choose from other options to support his goals relative to foreign states. The President’s awareness of the exemptions to covert action helps inform this policy decision.

Title 50, U.S. Code, defines covert action in statute, and lays out the broad categorical exemptions to this activity. Section 413b(e) attempts to define what covert action is not:

- Activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of U.S. government programs, or administrative activities.
- Traditional diplomatic or military activities or routine support to such activities.
- Traditional law enforcement activities conducted by U.S. government law enforcement agencies or routine support to such activities.
- Activities to provide support to the overt activities (other than activities described in the first three categories) of other U.S. government agencies abroad.

The definition of 'traditional military activities (TMA)' is perhaps intentionally vague; however, it is central to this discussion because it identifies the limits of the traditional roles and responsibilities for the military, in an effort to reduce friction between the activities of the CIA and DOD. Congress further refined the definition of traditional military activities down to four key conditions:²⁰

- They are conducted by U.S. military personnel.
- They are under the direction and control of a U.S. military commander.
- They are preceding and related to anticipated hostilities, or are related to ongoing hostilities involving U.S. military forces.

- The U.S. role in the overall operation is apparent or to be acknowledged publicly.

These legislators further clarified the term “anticipated hostilities” to mean that “approval has been given by the National Command Authorities for the activities and for the operational planning for hostilities” in the same Conference Report.²¹ This point illustrates that if the military is tasked to plan for ongoing or future hostilities by the Secretary of Defense, through the military orders process, that all activities pursuant to such an order do not constitute covert action. The intent was to draw a line between those actions that are under the direction and control of the military chain of command, and those that are not. The problem is that there are no guarantees to the successful attainment of desired foreign policy objectives when choosing between covert or overt operations. If the expectation and the desire is that the act be plausibly deniable to escape the scrutiny of international law and the public, then it should be a covert operation.

International law and the legitimate use of force

Since the Treaty of Westphalia, the sovereign state has maintained a monopoly on the use of legitimate force to employ the tools of national power against existential threats to territorial integrity and political sovereignty.²² In this tradition, the domestic legal architecture of the United States has explicitly authorized covert action to influence potential threats, while implicitly authorizing violations of the domestic laws of the targeted foreign state.²³ There is no indication that Congress intended to exempt any participant in covert activities from abiding by IHL as it relates to armed conflict and, though silent regarding IHL rules, the authority granted within the 2001 AUMF must also

be assumed to be based upon IHL compliance. It is the policy of the DOD to abide by the constraints of IHL always, and though the CIA is not known to have a similar policy, it must be assumed that they constrain themselves similarly. The IHL guiding principles of necessity, proportionality, and distinction equally limit DOD or CIA operations as they relate to the use of force. Therefore, though the CIA and DOD are similarly constrained by IHL and domestic law, the primary concern is the absence of protections afforded covert actors caught employing the use of force during conflict, or otherwise, which sustains damage to our national reputation by employing force in an illegitimate manner.²⁴

The uncertain fate of IHL violators calls into question the wisdom of utilizing military personnel, or units, in covert operations that employ the use of force during peacetime because there is no privileged combatant status without an armed conflict. Likewise, the body of international law does not specifically prohibit espionage, or spying, but it is illegal according to the domestic laws of most nations, despite the international norm that espionage is an extension of a state's inherent right of self-defense.²⁵ Anyone caught spying would normally be expected to be tried by the domestic laws of the aggrieved nation as a matter of customary international law. In the United States, the Congress has provided domestic authorization for government entities to conduct foreign espionage, while simultaneously considering this act to be illegal when conducted against the United States. Espionage is typically one form of covert action that falls short of the use of force, yet exposes the spy to the laws of the targeted nation.²⁶ Similarly, the consequence of being caught covertly using force in a nation with which we are not at war is likely to be severe, as in the arrest of several

Israeli agents caught by Iranian officials in connection with the assassination of a few nuclear scientists.²⁷ During times of war, spies may face execution for operating beyond the rules governing privileged combatant status, especially if caught in the employment of force.

The law of armed conflict may be viewed largely as international humanitarian law based upon international treaties and the rules established by customary international law.²⁸ Central to this discussion are the protections afforded the privileged combatant. The 3rd Geneva Convention identifies several conditions that must be met to afford an individual the status of privileged combatant:²⁹

- Members of the armed forces of a Party to the conflict
- Members of militias not under the command of the armed forces, with the following traits:
 - That of being commanded by a person responsible for his subordinates.
 - That of having a fixed distinctive sign recognizable at a distance;
 - That of carrying arms openly.
 - That of conducting their operations in accordance with the laws and customs of war.
- Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had

time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

By meeting the requirements of the privileged combatant, the individual is afforded the following general protections as a prisoner of war:³⁰

- Humane treatment at all times.
- Prohibitions against unlawful acts or omissions that may endanger the prisoner while in custody of the detaining power, such as physical mutilation or experimentation.
- Protection against acts of violence, intimidation, insults, and subjection to public curiosity.
- Prohibitions against reprisals against the prisoner of war.
- Entitled to respect for their persons and their honor at all times.
- Maintenance of their health and medical attention.

Therefore, the benefits as a privileged combatant afford the military member protections should they become prisoners during wartime. At the same time, the law of armed conflict provides internationally accepted practices in the conduct of war. The law of war prescribes how to address those that do not conform to the rules, and mandate protections for innocents caught in the carnage. Those individuals that participate in hostilities yet violate the norms that distinguish them from civilians and non-combatants, or some other applicable law of war, surrender their privileged status. In light of Geneva Convention III and IV, violators are either treated as prisoners of war until they can face a competent military tribunal,³¹ or they may be tried and punished in a domestic court of the offended nation,³² respectively. The cement for this body of international law that

bind all parties together to abide by the same rules during an armed conflict is the concept of reciprocity.

Customary international laws are the norms of state behavior within the international system that are established by state practice, with belief in the law's usefulness to that state.³³ Due to the fact that states act in their own best interest, there would be no incentive for them to cooperate in bilateral or multilateral arrangements without the principle of reciprocity. The principle of reciprocity centers on the idea that states enter into relationships between relatively equal parties with a *"this-for-that"* arrangement based upon self-interest: any state that claims a right under a customary international law must provide all other states that same accord.³⁴ With the principle of reciprocity in mind, it is not difficult to understand why DOD policy mandates compliance with the law of armed conflict at all times.³⁵ Furthermore, it is not surprising that there is nothing to indicate that Congress envisioned the CIA to violate the law of armed conflict, or to employ the use of force without legitimate justification.³⁶ President Obama's comments during his Nobel Prize acceptance speech emphasized the importance of following the laws of armed conflict: "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct ... [E]ven as we confront a vicious adversary that abides by no rules ... the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength."³⁷ Significant to the distinctive status of personnel conducting either covert or overt action during armed conflict is the legal rationale provided within the international system.

The right to self-defense in international law

The United Nations Charter (UN Charter) is largely recognized as providing support to the rule of law within the international legal system.³⁸ The stated purpose of this charter is to take collective action to provide for the prevention and elimination of threats to peace, acts of aggression, and to support the principles of justice and international law.³⁹ Toward this end, one of the first articles in the UN Charter, Article 2(4), prohibits the “threat or use of force against the territorial integrity or political independence of any state...”⁴⁰ This article in effect makes it illegal by international law to violate the sovereignty of another state through the use of force, or the threat of the use of force. Chapter VII of the UN Charter does, however, provide for the authority of the UN Security Council to make a determination that its members may take military action against the will of another state in order to restore peace and international stability if non-military action proves inadequate.⁴¹ Action of this sort requires a majority vote of the members of the UN Security Council that is challenging to attain.⁴² An exemption does exist whereas a state may ask for assistance with a domestic problem from a third party without the consent of the UN Security Council. In this case, the third party state may provide military support with the permission of the host nation and does not, therefore, constitute a violation of sovereignty in accordance with the UN Charter. Notwithstanding the permission granted by the host state or the ratification of a UN Security Council Resolution (UNSCR), the charter provides one final exception to the prohibition upon the threat, or use of force: self-defense.

The UN recognizes the inherent right of a state to defend itself, alone or with the assistance of other states, against the aggression of another entity until such time as the UN Security Council is able to take any measures necessary to reestablish order.

Article 51 of the UN Charter specifically states that “*nothing* in the present Charter shall impair the inherent right to individual or collective self-defense...”⁴³ The key provision in this article of the charter is that “*if* an armed attack occurs,” then the inherent right of self-defense may be invoked. Some interpret this to mean that unless there is an armed attack from another nation that only the UN may act.⁴⁴ The United States interprets this to mean, however, that it may act if a neutral host-nation proves to be unwilling and unable to address a threat within its borders.⁴⁵ Yet, to take such drastic action requires that the threatened nation demonstrate that requests for redress have been ignored, as well as the immediacy of the threat.⁴⁶ This “unwilling and unable” test, applies in part to non-state actors during times of war and peace.⁴⁷ A contemporary example of the invocation of Article 51 of the UN Charter in accordance with the “unwilling and unable” test was the raid on the Abbottabad compound in Pakistan by United States forces that killed Usama Bin Laden.⁴⁸

Analysis

Whether confronting terrorism in the sanctuary of a host-state with which the United States is not at war, or within a state that our nation is engaged in an armed conflict, it is national policy that any exercise of national power be supported by the rule of law. The President of the United States is supported by law both domestically and internationally by maintaining the position that the nation is engaged in an armed conflict with al Qaeda and its adherents, justified by self-defense. He has been provided with the appropriate domestic war powers’ authorizations from Congress to pursue this threat in the 2001 AUMF. His lethal targeting operations are conducted consistent with law of war principles and adhere to a rigorous decision-making process,

while taking advantage of the nation's technological superiority in the interest of precision.⁴⁹ This paradigm, while legally supportable from the United States' perspective, also appears to be legally and logically supportable upon the international stage, so long as it does not serve to isolate the United States. While evidence suggests that a majority of international lawyers support the American armed conflict paradigm with respect to al Qaeda and its adherents, public discourse upon the legality of covert and clandestine, or unacknowledged, operations challenges the legitimacy of our nation's methods for achieving its foreign policy aims.⁵⁰ One must first have an understanding of the difference between covert and clandestine operations to decide which operation is better suited to achieve their goal.

Clandestine operations are operations that seek to conceal the operational act itself.⁵¹ Although not defined in statute, this definition is generally accepted to equate to an operation that is conducted secretly in order to preserve the element of surprise of the activity. The DOD definition of clandestine operations is more restrictive in that the act is not only conducted in secrecy, but it is not apparent to have ever taken place.⁵² The DOD definition does not address the use of force, but appears to be confined to the context of intelligence collection; therefore, for the purposes of this paper, clandestine operations will equate to operational acts conducted in secret to preserve the element of surprise or deception upon an enemy. Similarly, unacknowledged military operations are operations that are clandestine in nature that the government does not intend to confirm or deny *to the public* until such time as military necessity allows for it; there is no time limitation on when acknowledgement must take place, just that the intent to acknowledge is present or unavoidable.⁵³ Unacknowledged operations in no way imply

that these activities are not reported to the appropriate oversight mechanisms established by law; only that they are masked from the public until the operation is concluded and the conditions are appropriate for acknowledgement. Clandestine, or unacknowledged, military operations, therefore, are not covert action and conform to the requirements of traditional military operations. For the purposes of this paper, clandestine and unacknowledged operations will be used interchangeably.

The use of the military to conduct covert action in general undermines the protected status afforded to members of the armed forces in times of conflict and damages the legitimacy of the Armed Forces of the United States, as well as the system it derives its' authority from. As indicated earlier, the CIA is expected to break the laws of other countries, while the military is expected to follow them unless our nations are at war and the law of armed conflict applies.⁵⁴ Furthermore, covert action clouds the principle of distinction by removing the overt symbols of the privileged combatant, namely the wear of distinctive insignia, carrying arms openly, and it breaks the responsible chain-of-command in efforts to preserve the anonymity of the sponsor; the critical element for conducting covert action in the first place. Without these overt symbols, military personnel run the risk of being labeled unlawful belligerents and are subject to the domestic laws of the offended state.⁵⁵

If the intention of policy-makers is to acknowledge the successful execution of an operation and to deny anything short of success, then the operation is not covert. Furthermore, if the nature of the act itself is difficult to conceal, such as a missile strike or a raid, then the operation cannot and should not be considered a covert action; any attempt to deny it might be met with irrefutable evidence that will damage the credibility

of the government. A more appropriate operational designation for such an act would be a clandestine military operation, approved by the President, and supported by the law of war as the legitimate use of force during an armed conflict. According to international law, the United States relative to the legitimate use of military force in an armed conflict, would either have to secure the permission of the host-state, have the backing of a UN Security Council Resolution, or demonstrate the unwillingness and inability of the host-state to address the threat in order to act clandestine. Domestically, the President must have the congressional authorization to use military force as manifested in the 2001 AUMF. Though the facts of each case will certainly be debated, the clandestine use of legitimate force by the military is supportable by law, countering the damaging effects to the “image and texture” of our democracy that contemporary covert actions have allegedly had.⁵⁶

The traditional domain of the CIA, with an established process and history that policy-makers have grown comfortable with, is covert action.⁵⁷ The CIA is globally positioned to conduct foreign influence activities that the United States government does not intend to be apparent or acknowledge.⁵⁸ The CIA possesses remarkable organizational flexibility with the ability to act, in some cases, more rapidly than the military.⁵⁹ The intent of covert action to mask the identity of the sponsor toward the aim of influencing a foreign entity without risking escalation, or starting a war, necessarily excludes the employment of the armed forces to achieve that goal.⁶⁰

Covert action is seen as a cost effective use of national power that is useful toward influencing foreign powers to behave in a manner favorable to U.S. national interests without resorting to armed conflict, although it is not without its inherent risk of

blowback if discovered.⁶¹ Covert operations that employ the use of force place the government in the precarious position of denying patently undeniable acts as evidenced by the CIA drone campaigns in Pakistan and Yemen, not to mention the raid in Abbottabad that killed Usama Bin Laden. These examples are actually clandestine operations intended to achieve tactical surprise on the intended enemy target. In the case of the Abbottabad raid, the intent may have also been to achieve strategic-level surprise to ensure Pakistan's non-interference with the operation.⁶² Operations improperly characterized as covert, rather than as clandestine, risk the credibility of the nation relative to its abilities to deny that it was responsible for the act and to cope with any associated blowback.⁶³ The inherent risks in covert operations, as well as the history of mixed results with such operations as the Bay of Pigs, the Nicaraguan harbor mining, or the Iran-Contra affair, are precisely the reason that they are held to such a rigorous approval process.⁶⁴

Beyond the use of force, some congressional leaders are uncomfortable with clandestine military operations beyond the designated areas of conflict because they escape the same oversight requirements of covert action, yet carry similar political risks.⁶⁵ In the case of the covert action findings process, the President is required to notify the intelligence committees of desire to conduct an operation to achieve one or more foreign policy objectives. The opponents of clandestine military operations believe these operations lack the congressional sanction of the intelligence committees that covert operations are subject to. This lack of oversight for each clandestine act has been described as a circumvention of the findings process because such operations are essentially deemed covert operations by the intelligence oversight committees in

Congress.⁶⁶ Taken within the more specific context of the use of force outside of designated areas of conflict, policy-makers can only expect the political and diplomatic risks to increase. The opponents of clandestine military operations beyond the designated areas of conflict believe that the Armed Services Committees, specifically designed to provide congressional oversight for military operations, are staffed inadequately to sufficiently attend to this task.⁶⁷ Yet, specifically in this context, the Secretary of Defense has implemented an approval process to mitigate the political and diplomatic risks of these unacknowledged, or clandestine, activities: the military is required to seek Presidential approval prior to each use of force. This approval system, on occasion, even allowed for advanced approval from the President to be delegated for commanders to strike targets when the opportunity presented itself.⁶⁸ This high-level approval process, though not found in statute, is commensurate with the inherent risks of this type of operation. Taken with the oversight systems already enshrined in the law governing the CIA and the DOD, this process provides the appropriate balance of supervision to the use of military force outside of designated areas of conflict.⁶⁹ The challenge is, and will continue to be, the timeliness of this decision-making process and the delegation of strike authority to the appropriate level of command to empower military commanders to act when the opportunity and appropriate conditions present themselves.

Conclusion

The President of the United States possesses two viable options open to him relative to the use of force against al Qaeda terrorists or their affiliates outside of the designated areas of conflict: traditional military activity or covert action. Both activities may be

conducted in secrecy to preserve tactical surprise and neither require immediate public acknowledgement.⁷⁰ The decision to use one over the other must match the actor with the action that provides the best opportunity to achieve the foreign policy objective, considering both the success and failure of the act with the consequences of being labeled as the sponsor. If the act cannot be plausibly deniable, then it should not be considered a covert action. Yet, while covert action spans the operational continuum, so does traditional military activity. Therefore, it is the policy and the strategy that shapes the choice of covert action or traditional military activity.⁷¹ If the policy and strategy do not align well with the means used to accomplish the objective, then heavy costs may be realized in political blowback.⁷² With a generally accepted war paradigm, the President and nation are best served to employ the military use of force as an overt symbol of legitimate American power⁷³ under the condition that the activity is supported by a UN Security Council Resolution, is an act of self-defense and the host-state is unwilling or unable to address the threat, or the host-state provides consent. The continuation of a streamlined approval process through the Secretary of Defense and National Security Staff to the President of the United States provides the necessary oversight for an act carrying such foreign policy risk. No changes or addition to domestic or international law is necessary or recommended: this is a policy issue. To refine the law would be to further constrain national-security decision making in the face of future, and unforeseen threats. In the interest of maintaining the intelligence capability of the United States, the CIA should be preserved for the more subtle and sophisticated covert influence activities that possess significant potential to plausibly deny sponsorship. Influence is not coercion, but the use of force is.

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